Supreme Court, U. S.
FILED
FEB 14 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-6084

MAURICE SAVARIN, Appellant

V.

NATIONAL BANK OF COMMERCE - MASTER CHARGE, Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TENNESSEE

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, appellant, Maurice Savarin, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed with his appeal in forma pauperis.

Appellant is unable to pay the fees and costs of this proceeding or to give security therefor as is more particularly shown by the attached affidavit.

ELBERT E. EDWARDS, III

J. MICHAEL FLETCHER
ATTORNEYS FOR APPELLANT
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1254 Lamar Avenue
Memphis, Tennessee 38104
(901) 526-5132

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MAURICE SAVARIN, Appellant

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_____

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_____

AFFIDAVIT

_____

Maurice Savarin, appellant, having been duly sworn, states, in support of his motion for leave to proceed in forma pauperis:

1. That I seek this appeal under 28 U.S.C. §1257(2) to review a decision of the Court of Appeals of Tennessee.

2. That due to my poverty I am unable to pay the costs of this appeal or give security for same.

3. That I believe that I am entitled to the relief I seek in this cause.

4. The nature of the proceedings and issues presented are briefly stated as follows:

I have been denied an opportunity to fully assert my personal property exemption rights due to the construction and application of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) which denies my equal protection and due process of law in violation of my constitutional rights as secured by the Fourteenth Amendment to the United States Constitution.

Maurice Savarin
MAURICE SAVARIN

SWORN AND SUBSCRIBED TO before me this the 11th day of February, 1980.

Anne R. Coleman
NOTARY PUBLIC

My Commission Expires:
My Commission Expires Mar. 3, 1982

IN THE
SUPREME COURT OF THE UNITED STATES

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No. _____

_____

MAURICE SAVARIN, Appellant

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NATIONAL BANK OF COMMERCE - MASTER CHARGE, Appellee

_____

ON APPEAL FROM THE COURT OF APPEALS OF TENNESSEE

_____

JURISDICTIONAL STATEMENT

_____

Appellant, Maurice Savarin, prays that this Court grant an appeal to review the decision of the Court of Appeals of Tennessee, Western Section, which was affirmed by the refusal of the Supreme Court of Tennessee to grant appellant permission to appeal to that court; and further, that on hearing, the judgment of the Court of Appeals of Tennessee be reversed. Appellant submits this jurisdictional statement to demonstrate that this Court has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee (App. 1) is unreported. The per curiam denial of appellant's appeal to the Supreme Court of Tennessee is included herein (App. 2).

JURISDICTION

This action was commenced in the state courts as an appeal from a judgment of the Circuit Court of Tennessee for the Fifteenth Judicial Circuit at Memphis which denied appellant's petition for writs of certiorari and supersedeas which sought to quash an execution upon certain personal property which appellant claimed as exempt under Tennessee Code Annotated, Section 26-202 (Cumm. Supp. 1979), Volume 5 at pages 262-263 (App. 4). Said petition was brought pursuant to Tennessee Code Annotated, Section 26-802(4) (Official Ed.), Volume 5 at page 858.

On appeal to the Court of Appeals of Tennessee, appellant asserted that the trial court's ruling resulted in an application of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), Volume 5 at pages 263-264 which was repugnant to the Fourteenth Amendment to the United States Constitution. The Court of Appeals of Tennessee, in an opinion dated September 18, 1979, upheld the validity of the application of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) and affirmed the trial court (App. 1). The Supreme Court of Tennessee denied appellant's request for permission to appeal on November 13, 1979 (App. 2) and appellant's request for reconsideration of that denial on December 27, 1979 (App. 3).

Notice of Appeal to this Court was filed in the Court of Appeals of Tennessee on January 24, 1980. (App. 6)

Jurisdiction of this appeal is conferred by 28 U.S.C. §1257(2) in that the validity of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) Volume 5 at pages 263-264, as construed, has been drawn into question as being repugnant to the Fourteenth Amendment to the United States Constitution; and the decision of the highest court of the State of Tennessee is in favor of its validity. This Court has recognized

appeal as of right from a decision of the highest court of a state in Cohen v. California, 91 S.Ct. 1780, 403 U.S. 15 (1971), rehearing denied 92 S.Ct. 26, 402 U.S. 876. In that case, as in this appeal, Mr. Cohen had exhausted his state court appeals by being denied an appeal to the California Supreme Court. In Huffman v. Pursue, Ltd., 95 S.Ct. 1200, 1209, 420 U.S. 592, 605 (1975), Mr. Justice Rehnquist states that, "where a final decision of a state court has sustained the validity of a statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right".

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

AMENDMENT XIV, SECTION I, UNITED STATED CONSTITUTION

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CODE ANNOTATED, SECTION 26-203 (CUMM. SUPP. 1979)

> 26-202. Personal property exempt from execution, seizure or attachment. —— Personal property to the aggregate value of two thousand five hundred dollars ($2,500) shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to his vocation or pursuit or to the ownership of his abode. Such person may select for exemption the items of the owned and possessed personal property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of two thousand, five hundred dollars ($2,500). [Acts 1978 (Adj.S.), ch. 915, §3.]

TENNESSEE CODE ANNOTATED, SECTION 26-203 (CUMM. SUPP. 1979)

> 26-203. Procedure for exercising exemption —— Notice. —— Should such person become a judgment debtor, he must exercise the exemption

as provided in §26-202 by filing a list of all the items he then owns, constructive or actual, which he chooses to declare as exempt, along with the value of each such item. Such listing shall be on oath and filed with the court having jurisdiction. Furthermore, the judgment debtor may modify or amend the listing from time to time as he deems necessary.

Such claim for exemption by way of listing, modification or amendment thereto may be filed either before or after the judgment in the case has become final and shall have effect as to any execution issued after the date such claim for exemption is filed. However, subject to such exemption as is further set forth herein a claim for exemption filed after the judgment has become final will have no effect as to any execution which is issued prior to the date the claim for exemption is filed, and as to such preexisting execution the claim for exemption shall be deemed waived.

Provided further that it shall be the duty of the clerk of the court from which process is issued to cause to be stapled to, printed upon or otherwise securely affixed to the warrant, summons or other leading process in the action a typed or printed notice which shall read as follows:

NOTICE

TO THE DEFENDANT(S):

Tennessee law provides a twenty-five hundred dollar ($2,500) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer, [Acts 1978 (Adj.S.), ch. 915, §4].

QUESTION PRESENTED

1. Does Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), as applied, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On January 26, 1977, a judgment in the amount of One Thousand Two Hundred Sixty Dollars and Sixty-Seven Cents ($1,260.67) was entered in the General Sessions Court of Shelby County, Tennessee, against appellant, Maurice Savarin, in favor of appellee, National Bank of Commerce - Master Charge (hereinafter referred to as NBC) (App. 1). That judgment became final February 5, 1977.

One and one-half years later, NBC issued a levy of execution on Mr. Savarin's automobile. The automobile was attached on June 26, 1979.

Appellant filed a Petition For Certiorari and Supersedeas (App. 4) in the Circuit Court of Tennessee for the Fifteenth Judicial Circuit at Memphis on July 23, 1979. That petition, filed pursuant to Tennessee Code Annotated, Section 26-802(4) (Official Ed.), Volume 5 at page 858, sought an order quashing the execution upon the automobile which Mr. Savarin claimed as exempt under Tennessee Code Annotated, Section 26-202 (Cumm. Supp. 1979), Volume 5 at pages 262 and 263. The Circuit Court refused to issue Writs of Certiorari and Supersedeas to grant a hearing to review appellant's petition. While no order was entered, the judge noted that his action was based upon an unreported decision of the Court of Appeals of Tennessee, City National Bank v. Griffin. (App. 5). The judgment debtor, Savarin, brought the matter before the Court of Appeals of Tennessee prior to the scheduled judicial sale of the property and had the sale enjoined pending review.

The central issue of the appeal turned on the construction of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), Volume 5 at pages 263 and 264, and the effect of that construction upon certain judgment debtors. Prior to the enactment of Tennessee Code Annotated, Section 26-203, Tennessee's exemption provisions, Tennessee Code Annotated, Section 26-201 thru 216 (Official Ed.), Volume 5 at pages 592-609, were silent as to the procedure for claiming personal property exemptions. Prior to the enactment, the only judicially accepted method of asserting one's exemptions was by certiorari under Tennessee Code Annotated, Section 27-802(4) (Official Ed.). See Travelers Indemnity Co. v. Callis, 481 S.W.2d 384 (Tenn. 1972). However, after May 5, 1978, (the date on which Tennessee Code Annotated, Section 26-203 became law) a new procedure for asserting the exemptions was provided within the exemption statutes. The new procedure provided that should a person become a judgment debtor, he must assert his exemptions by filing a list of personal property which he intends to exempt from execution. If the debtor fails to file the list prior to issuance of an execution, he is deemed to have waived any claim of exemption in property subject to the execution. Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) also mandated the clerks of trial courts to issue a statutory notice with all leading process outlining the new provisions. Obviously, no such notice can be given through leading process to those judgment debtors, such as Maurice Savarin, who were served prior to May 5, 1978.

It was the opinion and judgment of the Court of Appeals of Tennessee entered September 18, 1979 (App. 1), affirming the trial court, that all judgment debtors, whether or not they became judgment debtors subsequent to enactment of the new provision, are required to timely file the list

to successfully assert their exemption rights. Failing to so comply they are deemed to have waived the right to exercise their exemption rights in the property upon which execution has issued. The practical effect of this construction is to divest appellant of a statutory right to exempt his automobile from the reach of NBC. The practical effect as to other judgment debtors who, like Mr. Savarin, were served with leading process prior to May 5, 1978, is to subject them to the loss of all of their personal property by the issuance of one execution with no notice or opportunity to assert any exemption right. This construction emasculates the personal property exemption rights provided by Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) with regard to judgment debtors served with leading process prior to the new act.

How The Federal Question Was Presented

Appellant challenged both in his petition for writs of certiorari and supersedeas filed in the trial court and on appeal to the Court of Appeals of Tennessee that Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), as applied, denied appellant due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals of Tennessee refuted this argument and held the statute valid using the following language:

> "As was held above, personal property exemptions for debtors are not vested rights. This court finds that the garnishment law which became effective on May 5, 1978, applies to those who were judgment debtors before May 5, 1978. This court further finds that this application does not violate either the United States or the Tennessee Constitution".

Review was sought from the Supreme Court of Tennessee upon the same issues. By an order dated November 13, 1979, the state Supreme Court refused appellant's Request

for Permission to Appeal. (App. 2) A petition seeking reconsideration of that denial was timely filed and likewise denied by an order dated December 27, 1979. (App. 3).

ARGUMENT TO SUPPORT GRANTING OF APPEAL

The Questions Presented Are Substantial

The question presented by appellant's challenge to the constitutionality of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), as applied, is substantial and requires plenary consideration by this Court for the resolution of the question. This Court has considered many elements of attachment of personal property under color of state law; however, it has never reviewed a state law which by design and application creates rights to protect judgment debtors and then effectively divests a certain class of those judgment debtors of those exemption rights. It presents questions of substantial constitutional importance.

Practically, the statute, as applied, could potentially result in the taking by judgment creditors of all of the personal property of pre-Act judgment debtors except that property specifically exempted by Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), Volume 5 at page 264. A judgment creditor could quite literally empty a judgment debtor's home of all personal property. This could happen to a judgment debtor who suffered the judgment ten or more years before the new procedure for claiming property as exempt became law. It could happen to a judgment debtor who had, prior to the new act, successfully claimed his personal property as exempt, but had not complied with the new provision.

The law of Tennessee provides that judgments shall survive for ten years and are subject to revival within that time. Tennessee Code Annotated, Section 28-310 (Official Ed.), Volume 5 at page 1005. Certainly, there have been

thousands of judgments rendered by Tennessee courts in the ten years prior to May 5, 1978, worth millions of dollars. Many of those judgments have been satisfied, but many judgments, whether due to reasons within or beyond the control of judgment debtors, have not been satisfied. In the past, the personal property exemptions have provided a measure of protection from the reach of judgment creditors. Now, that reach is unbridled due to the application of Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979). The potential harm is substantial and merits the exercise of this Court's jurisdiction.

The Appeal Is Within The Jurisdictional Provisions of 28 U.S.C. §1257(2)

Appellant has consistently asserted that the construction given Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The Court of Appeals of Tennessee has upheld the validity of the statute, as construed, in the face of that challenge. That court, by its opinion, appears to have virtually ignored the constitutional issues raised. The Supreme Court of Tennessee has refused appellant's application for appeal.

Clearly, this appeal is within the jurisdictional provisions of 28 U.S.C. §1257(2).

Constitutional Issues Presented

Denial of Equal Protection of Laws

Mr. Savarin has argued that the construction given Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979), violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. An analysis of an equal protection challenge must begin with a review of "the character of the classification in question; the

individual interests affected by the classification; and the governmental interests asserted in support of the classification". Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999 (1972).

Character of the Classification

The classes created are: (1) all persons who were served with leading process and became judgment debtors prior to May 5, 1978, the effective date of Tennessee Code Annotated, Section 26-203, and (2) all persons who were served with leading process and became judgment debtors after May 5, 1978. The members of both classes are similarly situated since they are "persons" as defined in Tennessee Code Annotated, Section 26-202 (Cumm. Supp. 1979), that is, "bona fide citizens permanently residing in Tennessee who have suffered a judgment against them subjecting their property to execution". Both classes have been granted the right to set aside personal property of an aggregate value of $2,500.00 as exempt from the reach of judgment creditors. Both classes are also subject to the same procedure for asserting the exemptions and the waiver provision of the statute. While so similarly situated, only those post-Act judgment debtors are given the legislatively mandated notice. That notice must be attached to all leading process issued after May 5, 1978. It clearly puts the potential judgment debtor on notice of both the extent and nature of his exemption rights, and of the procedure available to assert his rights. It further cautions the debtor about the waiver provision. No such notice was given to Mr. Savarin, nor to any other person who suffered a judgment prior to the new act. Even though they do not receive the notice that all post-Act debtors must receive, the pre-Act judgment debtors are held to the standards of Tennessee Code Annotated, Section 26-203, and its waiver provision.

Individual Interest Affected

The effect of this classification places an unreasonable burden upon pre-Act judgment debtors to discover and comply with provisions of a new law about which all post-Act judgment debtors are, by law, fully apprised. The effect is a de facto stripping of personal property exemption rights from those persons who suffered judgments prior to the new Act. Despite not being given the statutory notice, pre-Act judgment debtors who fail to file a list of exempt property in a timely manner will be conclusively deemed to have waived the right to assert the exemption. Any property attached by legal process under those circumstances will be lost.

Governmental Interests Asserted
In Support Of The Classification

Appellant submits that there is no governmental interest asserted in support of the classification. Rather, the classification is destructive of governmental interest. The governmental interest in granting personal property exemptions is to allow a "debtor to retain a portion of his property free from the claims of creditors". Poore v. Bowlin, et al., 265 S.W.671 (Tenn. 1924). While the act contains no specific statement of purpose, appellant believes that the caption to the public act embodying Tennessee Code Annotated, Section 26-203 expresses the governmental interest.

> AN ACT to enact the Personal Property Owner's Rights Act of 1977; to provide certain personal property exemptions; to establish procedures for certain rights of judgment creditors and judgment debtors; to repeal Tennessee Code Annotated, Sections 26-201, 26-203, 26-206, 26-207, 26-208, 26-210, 26-211, 26-212, 26-213, 26-214, 26-215 and 26-216, and to enact the Tennessee Uniform Code, relative to execution by garnishment, and to repeal Chapter 5 of Title 26, Tennessee Code Annotated.

The state's interest is to protect a portion of the debtor's personal property so as to "provide a minimally decent

environment for human beings in their day-to-day lives". Fuentes v. Shevin, 407 U.S. 67, 89; 92, S.Ct. 1983, 1999 (1972). It is the antithesis of this purpose to abridge or deprive the exemption rights of one class of its citizens. It might be suggested that the government has a valid interest in the enforcement of the orders of its courts. This is true, but the state has decided to temper that interest by providing personal property exemptions. Appellant would, as a further response, echo this Court's words in Trimble v. Gordon, 436 U.S. 762, 769 97 S.Ct. 1459, 1469 (1977); "the Equal Protection Clause requires more than the mere incantation of a proper state purpose".

Standard of Review

After having isolated the nature of the classification, the private interest affected, and the governmental purpose furthered by the classification, the constitutionality of the classification herein is appropriately measured by the rational basis standard. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970). Appellant submits that even under this limited standard of review, no rational basis exists to justify the classification.

Denial of Due Process of Law

Appellant, Mr. Savarin, has asserted that the construction given Tennessee Code Annotated, Section 26-203 constitutes a taking of his property without due process of law, and creates an irrebuttable presumption invalid as denying due process of law. As construed, the provision violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Property Interest

The threshold question in a due process analysis must be: Does a protected property interest exist?

This Court has stated that property interests are "created and their dimensions are defined by an independant source such as state statutes or rules entitling the citizens to certain benefits". Goss v. Lopez, 419 U.S. 565, 572, 95 S.Ct. 729, 735 (1975). It appears clear from the title to the new act and the case law of Tennessee that personal property exemptions are "rights". Tennessee Code Annotated, Section 26-201 (Cumm. Supp. 1979), Volume 5 at page 262, Denny v. White, 42 Tenn. 284, 285 (1860); Poore v. Bowlin, 265 S.W. 671 (Tenn. 1924); Majors v. Carter, 135 S.W.2d 924, 925 (Tenn. 1940) (right and privilege). At a minimum, there is a reasonable expectation or claim of entitlement to the exemption. Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694 (1972). Appellant suggests that Mr. Savarin's personal property exemption is analogous to the tax exemption in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332 (1958), and is due the same protection under the Due Process Clause.

Taking Without Due Process of Law

The challenged statute contains the procedural due process which the Tennessee General Assembly deemed appropriate prior to operation of the waiver provision cutting off the full exercise of the exemption privilege. The potential judgment debtors are provided with a statutory notice setting out their rights and responsibilities under the new exemption law. They are given notice of how they should proceed in order to avail themselves of the protection of the exemption. In other words, those persons who are served with leading process are afforded due process before they face the loss of their right to fully assert their personal property exemption rights and the loss of their property. The notice informs potential judgment debtors that they have exemption rights and how they may claim property as exempt, thus affording them an opportunity to be heard in asserting those rights.

It is this process which was granted by the General Assembly that appellant submits he is due and which he has clearly been denied. The statute does not contemplate giving notice to those who were served with leading process prior to the Act. Absent this notice the appellant had no meaningful opportunity to fully exercise his personal property exemption rights. It might be argued that Mr. Savarin still has his personal property exemption and an opportunity to assert it. This argument has a hollow sound. This Court has clearly stated that a mere opportunity to be heard does not satisfy the challenge. "It is an opportunity which must be granted at a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). Appellant submits that to deny the statutorily mandated notice makes the opportunity to assert the claim of exemption not only meaningless in time and manner, but realistically nonexistent.

Governmental Function vs. Private Interest Affected

Mr. Savarin has lost not only his right to choose from his personal property that which he wishes to claim as exempt, but also the property itself. The importance of the exemptions is difficult to assess. To the wealthy, it may be insignificant. To the poor, it may preserve a subsistence level of life. Those who are denied an opportunity to assert their exemption may face the loss of all of their personal belongings by the issuance of one execution.

The state has conflicting functions. It is interested in seeing that the orders of its courts are enforced and honored. However, the function of the personal property exemption act is to limit the reach of judgment creditors and to preserve sufficient property for a person's "comfort, support and maintenance". Denny v. White, 42 Tenn. 283, 285 (1860).

Appellant submits that, at a minimum, he is due the process provided by Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979). This notice and opportunity to assert the exemption "raises no impenetrable barrier to the taking of a person's possessions". Fuentes v. Shevin, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994 (1972). However, the denial of such process does grievous and irreparable harm to the appellant and other similar judgment debtors.

Irrebuttable Presumption

Tennessee Code Annotated, Section 26-203 provides in part:

> . . . However, subject to such exemptions as is further set out herein a claim for exemption filed after the judgment has become final will have no effect as to an execution which is issued prior to the date the claim for exemption is filed, and as to such preexisting execution the claim for exemption shall be deemed waived.

By this language an irrebuttable presumption is created that all those who fail to make a timely claim for exemption pursuant to Tennessee Code Annotated, Section 26-203 (Cumm. Supp. 1979) have waived such claim. Irrebuttable presumptions have long found disfavor under the Due Process Clause. Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230 (1973); Elkins v. Moreno, 435 U.S. 661, 98 S.Ct. 1338 (1978).

The classic analysis of an unconstitutional irrebuttable presumption was set out in Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230 (1973). If the presumed fact is based upon a characteristic or basic fact and its effect is to place an additional burden or deny a benefit to the classification described by the characteristic, then that characteristic must be true in fact. This analysis has been further refined to a more limited situation. As applied to this case, if the state purports to be concerned with affording judgment debtors some protection from the

reach of judgment creditors but at the same time, denies to one seeking such protection a meaningful opportunity to show facts clearly bearing on that issue then that presumption fails before the Due Process Clause. Weinberger v. Salfi, 422 U.S. 749, 771, 95 S.Ct. 2457, 2470 (1975); Elkins v. Moreno, 435 U.S. 611, 98 S.Ct. 1338 (1978).

Tennessee Code Annotated, Section 26-202 purports to be concerned with providing judgment debtors with the protection of personal property exemptions. Tennessee Code Annotated, Section 26-203, irrebuttably presumes that all judgment debtors who fail to make a timely claim for exemption make a knowing waiver of such claim. At the same time, judgment debtors, such as Mr. Savarin, are denied an opportunity to present their claim for exemption, despite the fact that they do not and cannot make the "knowing" waiver which is presumed.

The class of judgment debtors described above is denied due process of law. There is no rational basis for the presumption. It does not possess any prophylactic purposes to justify its existence as was found in the statutes challenged in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457 (1975) and Mourning v. Family Publications Services, Inc., 411 U.S. 356, 93 S.Ct. 1652 (1973). Appellant submits that the waiver provision is an irrebuttable presumption violative of the Due Process Clause.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Elbert E. Edwards III

ELBERT E. EDWARDS, III

J. Michael Fletcher

J. MICHAEL FLETCHER
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February 12, 1980
DATE

APPENDIX 1

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

FILED
SEP 18 1979
JEWEL REDDEN, CLERK

NATIONAL BANK OF COMMERCE-MASTER CHARGE
PLAINTIFF-RESPONDENT
VS.
MAURICE SAVARIN
DEFENDANT-PETITIONER

FROM THE CIRCUIT COURT OF SHELBY COUNTY AT MEMPHIS

HONORABLE FRIEL HASTINGS
JUDGE

FOR PLAINTIFF-RESPONDENT

Glenn L. Millar, Jr. of Memphis

FOR DEFENDANT-PETITIONER

J. Michael Fletcher of Memphis

OPINION FILED: SEP 18 1979

AFFIRMED

MATHERNE, J.

SUMMERS, J.

EWELL, J.

Proceedings in this case were commenced in this court by the filing of a petition for certiorari and supersedeas by the defendant-petitioner, Maurice Savarin. By order of Judge Nearn on July 24, 1979, the petition for certiorari and supersedeas was ordered to be treated as an application for extraordinary appeal under Rule 10, TRAP.

The court read the petition and the briefs filed, heard the argument of counsel and was of the opinion that the petition should be granted. The matter was then heard by the court on September 6, 1979.

The facts in this case are simple. National Bank of Commerce-Master Charge, the plaintiff-respondent, obtained a judgment against the defendant in the General Sessions Court of Shelby County in the amount of $1,260.67. This judgment became final on February 5, 1977.

The sections of Tennessee Code Annotated dealing with garnishments were revised, and the revisions became effective on May 5, 1978. T.C.A. 26-202 provides for a personal property exemption of up to $2,500.00 for a judgment debtor. However, T.C.A. 26-203 provides that to have this property exempt from attachment, prior to execution, but either before or after the time that the judgment goes down, the debtor must file a list of all the items he owns that he wishes to declare as exempt along with the value of each item. Prior law made no statutory provisions for claiming the exemption. On June 26, 1979, the defendant's automobile was attached to satisfy the judgment of the plaintiff. After the attachment of his automobile the defendant attempted to claim this automobile as exempt property.

The issues presented for review in this case are: does T.C.A. 26-203 apply to persons who became judgment debtors before May 5, 1978, the effective date of the statute revision, and if so, does this application violate the Constitutions of the United States and Tennessee?

City National Bank v. Griffin, an unpublished opinion of this court filed on April 19, 1979, addressed a similar issue. No new law or cases have been brought to our attention which would cause us to overrule this decision.

We find two cases in this jurisdiction that are close in point to the case at bar. Although both of these cases are almost 40 years old, we cannot find that they have been overruled. It is not our function to make new law; it is our obligation to interpret the existing law as we understand it.

The facts in the case of *Majors v. Carter*, 135 S.W. 2d 924 (1940), are very similar to those in the case at bar. In the *Majors* case a judgment was entered on June 27, 1936, and execution was issued on the judgment on March 14, 1939, and levied on certain livestock belonging to Majors. On March 10, 1939, some four days prior to the issuance of the execution, certain sections of the law were repealed, and new law was enacted reducing the exemption for the judgment debtor from $750.00 to $450.00. The trial court held that since the judgment was rendered while the $750.00 exemption was in force, the judgment was entitled to the $750.00 exemption and not the $450.00 exemption which was in force at the time execution was issued. However, Chief Justice Grafton Green, speaking for the Supreme Court, reversed the trial court and stated:

> . . . A debtor has no constitutional right to withhold his personal property from satisfaction of a just claim of his creditor. Such a right has been conferred on him by statute and that right can be regulated or abolished by statute.
>
> . . .
>
> "The exemption privileges of a debtor are not vested rights, and hence it is within the power of the legislature to make property subject to execution for debts contracted or judgments entered under a previous law by which it was exempt."
>
> . . .
>
> In Harris v. Glenn et al., supra, the court expressed itself in these words:

> "Debtors have no vested right not to pay their debts. What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. * * * Exemption of property from levy and sale for the payment of debts, is but a privilege for the time being--mere grace and favor, dependent on the will of the state. An exemption which exists by statute may be reduced or withdrawn by statute."

Sherwin-Williams Co. v. Morris, 156 S.W. 2d 350 (1941), followed *Majors, supra*, by one year. The case concerned a note which was executed on November 20, 1936. Garnishment was issued on August 6, 1940, to collect the note. *Sherwin-Williams* quoted *Majors, supra*, and said that an exemption which exists by statute may be reduced or withdrawn by a later statute. Therefore, the exemption statute in force at the time execution was levied would apply.

As Judge Nearn said in the case of *Anderson v. Memphis Housing Authority*, 534 S.W. 2d 125 (1975):

> The fact that a statute is retrospective in application does not automatically render it unconstitutional and void. It is when a statute creates a new right or takes away a vested right or impairs contractural obligations that its retrospective application is constitutionally forbidden. . . .

As was held above, personal property exemptions for debtors are not vested rights. This court finds that the garnishment law which became effective on May 5, 1978, applies to those who were judgment debtors before May 5, 1978. This court further finds that this application does not violate either the United States or the Tennessee Constitutions.

The judgment of the lower court applying the garnishment law in effect on May 5, 1978, in the instant case was correct, and we hereby affirm the lower court. The costs of this cause are taxed against the defendant.

SUMMERS, J.

MATHERNE, J. (concurs)

EWELL, J. (concurs)

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

NATIONAL BANK OF COMMERCE-MASTER CHARGE PLAINTIFF-RESPONDENT VS. MAURICE SAVARIN DEFENDANT-PETITIONER	FROM THE CIRCUIT COURT OF SHELBY COUNTY AT MEMPHIS HONORABLE FRIEL HASTINGS JUDGE

FILED
SEP 18 1979
JEWEL REDDEN, CLERK

JUDGMENT

An order was entered granting the defendant an extraordinary appeal to this court under Rule 10, TRAP. After hearing the arguments of counsel and reading the briefs of the parties, this court is of the opinion that the relief sought by the extraordinary appeal should be denied and that the decision of the lower court should be affirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the relief sought under this appeal is denied.

2. That the judgment of the circuit court below is affirmed.

3. That the costs incident to this appeal are assessed against the defendant.

ENTER: SEP 18 1979

SUMMERS, J.

APPENDIX 2

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED
NOV 13 1979
JEWEL REDDEN, CLERK

NATIONAL BANK OF COMMERCE-MASTER CHARGE,
APPELLEE

VS.

MAURICE SAVARIN,
APPELLANT

SHELBY LAW

O R D E R

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Maurice Savarin is denied at cost of the appellant.

PER CURIAM

APPENDIX 3

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED
DEC 27 1979
JEWEL REDDEN, CLERK

NATIONAL BANK OF COMMERCE-MASTER CHARGE,
APPELLEE

VS.

MAURICE SAVARIN,
APPELLANT

SHELBY LAW

O R D E R

The "Petition for Reconsideration of Denial for Permission to Appeal" is denied. Costs will be paid by Maurice Savarin and his surety.

The motion for stay of mandate pending appeal to the Supreme Court of the United States is hereby transferred to the Court of Appeals for consideration,--it being the court from whose judgement the appeal is contemplated.

PER CURIAM

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

NATIONAL BANK OF COMMERCE - MASTER CHARGE,

Plaintiff.

VS. NO. 71438-BRD

MAURICE SAVARIN,

Defendant.

PETITION FOR CERTIORARI AND SUPERSEDEAS

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Comes your petitioner, Maurice Savarin, and respectfully shows unto the Court as follows:

1. That he is a resident of Shelby County, Tennessee.

2. That a judgment was entered against him in the General Sessions Court of Shelby County, Tennessee, in favor of National Bank of Commerce - Master Charge on January 26, 1977. That on February 5, 1977, said judgment became final.

3. That the General Sessions Civil Warrant number was 364910.

4. That on June 26, 1979, petitioner's 1972 Mercury Marquis automobile was attached to satisfy said judgment. That at the time the Shelby County Deputy Sheriff levied upon the automobile the petitioner verbally asserted his personal property exemption in said automobile pursuant to the personal property exemption acts in effect at the time the judgment became final. Despite the claiming of the exemption the property was attached and is being stored at Hill-Johnston, Inc., 2267 Lamar Avenue, Memphis, Tennessee and is scheduled to be sold on July 25, 1979, at 9:00 A.M.

5. That on June 28, 1979, petitioner filed an affidavit of exemption, claiming as a part of his personal property exemption said automobile, pursuant to Tennessee Code Annotated, section 26-203 which became law on May 5, 1978, replacing former law concerning personal property exemptions which did not require the filing of the said or like affidavit to assert the personal property exemption.

6. That the said petitioner received no notice of the new procedure for claiming exemption either as contemplated by Tennessee Code Annotated, section 26-203 or otherwise.

7. That the application of certain new provisions of Tennessee Code Annotated, section 26-201 et seq. in this case was improperly and illegally retroactive.

8. That the denial of notice and attachment of petitioner's personal property effects an operation of the law which is fundamentally unfair and constitutes a denial of due process in violation of the Tennessee and United States Constitutions.

9. That the unequal application of the notice provisions of the act create an unconstitutional classification between pre-May 5, 1978 judgment debtors and post-May 5, 1978 judgment debtors in that it denies equal protection of the laws in violation of the Tennessee and United States Constitutions.

10. That the petitioner has no other adequate remedy.

WHEREFORE PETITIONER PRAYS:

1. That a Writ of Certiorari issue to bring this suit to the ~~Circuit Court of Shelby County, Tennessee~~ Court.

2. That a Writ of Supersedeas issue to stay all execution on said judgment.

3. That upon a hearing the execution be quashed.

4. That the petitioner have such other and further relief as the Court deems proper.

THIS IS THE FIRST APPLICATION FOR THE WRIT OF CERTIORARI AND SUPERSEDEAS IN THIS CAUSE.

J. MICHAEL FLETCHER
ATTORNEY FOR DEFENDANT
MEMPHIS AREA LEGAL SERVICES, INC.
Suite 401, Belmar Building
1254 Lamar Avenue
Memphis, Tennessee 38104
(901) 726-1563

HARRIETT A. MILLER
ATTORNEY FOR DEFENDANT
MEMPHIS AREA LEGAL SERVICES, INC.
3120 Summer Avenue
Memphis, Tennessee 38112
(901) 324-7307

AFFIDAVIT

STATE OF TENNESSEE:

COUNTY OF SHELBY :

MAURICE SAVARIN, after being duly sworn makes oath that he is the petitioner in the foregoing cause and that he has read the Petition and that the facts stated therein are true to the best of his knowledge, except those made upon information and belief and these he believes to be true.

He further makes oath that owing to his poverty, he is unable to bear the expense of the action that he is about to commence, but that he is justly entitled to the relief sought, and that he is a bona fide resident of the State of Tennessee.

MAURICE SAVARIN

SWORN to and SUBSCRIBED before me this 18th day of July, 1979.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

My Commission Expires Mar. 3, 1982

NOTICE

TO: NATIONAL BANK OF COMMERCE - MASTER CHARGE, PLAINTIFF
GLENN MILLAR, ATTORNEY

You are hereby notified that Maurice Savarin on the 20th day of July, 1979, will present to the Circuit Court of Shelby County, Tennessee, his Petition for Writ of Certiorari, seeking to have this case removed to the Circuit Court, and the execution of the judgment of the General Sessions Court stayed by Writ of Supersedeas pending the review by the Circuit Court.

This the _____ day of _____, 1979.

J. Michael Fletcher

J. MICHAEL FLETCHER
ATTORNEY FOR DEFENDANT
MEMPHIS AREA LEGAL SERVICES, INC.
Suite 401, Belmar Building
1254 Lamar Avenue
Memphis, Tennessee 38104
(901) 726-1563

FIAT

TO THE CLERK OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Upon the filing of the foregoing petition issue Writ of Certiorari and Supersedeas as prayed for herein, notice has been given to the adverse party in compliance with TCA 27-813, security is dispensed with.

_____
JUDGE

Application for Writ of Certiorari & Supersedeas
Denied under authority
City Lake Court v Pressure
Shelby Law #37
Irvil Hawkins
Judge
7/23/79

APPENDIX 5

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION

FILED
APR 19 1979
JEWEL REDDEN, CLERK

CITY NATIONAL BANK
PLAINTIFF-APPELLEE

VS.

RAY GRIFFIN
DEFENDANT-APPELLANT

FROM THE CIRCUIT COURT OF
SHELBY COUNTY AT MEMPHIS

HONORABLE FRIEL HASTINGS
JUDGE

FOR PLAINTIFF-APPELLEE

Glenn L. Millar, Jr. of Memphis

FOR DEFENDANT-APPELLANT

Harriett A. Miller of Memphis

OPINION FILED: APR 19 1979

AFFIRMED

MATHERNE, J.

SUMMERS, J.

LEWIS, J.

City National Bank, the plaintiff-appellee, sued Ray Griffin, the defendant-appellant, for a debt. On April 19, 1978, judgment was rendered in favor of the plaintiff, and on April 29, 1978, this judgment became final. On June 7, 1978, the checking account of the defendant was attached.

On June 9, 1978, the defendant filed an affidavit of exemption with the General Sessions Court claiming an exemption of approximately $574.94 which was the money in the defendant's checking account. The plaintiff refused to recognize the defendant's claim for exemption, basing its refusal on the "Personal Property Owner's Rights and Garnishment Act of 1977" which became effective on May 5, 1978.

The prior law gave a defendant a personal exemption of $2,500.00 but did not set forth the procedure for claiming the exemption. The new law required that a claim for an exemption must be filed prior to execution on the judgment.

The defendant filed a Petition for Certiorari and Supersedeas in the Circuit Court of Shelby County, Tennessee, for the purpose of quashing the levy. The trial judge found the defendant's claim of exemption with regard to the attached property was not valid and that the levy should not be quashed.

The defendant perfected his appeal to this court and assigned as error:

> The Trial Judge erred in ruling that Mr. Griffin's claim of exemption with regard to attached property was not valid and the levy against said peroperty should not be quashed.

The statute modifying the procedure for claiming exemptions from executions was passed by the General Assembly in 1978 and certain portions of that law (Chapter 915-Public Acts of 1978) are as follows:

> Section 4. Should such person become a judgment debtor, he must exercise the exemption as provided in Section 3 (personal property to the aggregate value of $2,500.00) by filing a list of all

the items he then owns, constructive or actual, which he chooses to declare as exempt, along with the value of each such item. Such listing shall be on oath and filed with the Court having jurisdiction. Furthermore, the judgment debtor may modify or amend the listing from time to time as he deems necessary.

Such claim for exemption by way of listing, modification or amendment thereby may be filed either before or after the judgment in the case has become final and shall have effect as to any execution issued after the date such claim for exemption is filed. However, subject to such exemption as is further set forth herein a claim for exemption filed after the judgment has become final will have no effect as to an execution which is issued prior to the date the claim for exemption is filed, and as to such preexisting execution the claim for exemption shall be deemed waived. (Emphasis added)

Chapter 915 which was in effect on the day of levy, June 7, 1978, required that the affidavit of exemption, to be effective, must be filed prior to issuance of the execution. The affidavit of exemption was filed on June 9, 1978, two days after the execution and levy.

The facts in the case of *Majors v. Carter*, 135 S.W. 2d 924 (1940), are very similar to those in the case at bar. In the *Majors* case a judgment was entered on June 27, 1936, and execution was issued on the judgment on March 14, 1939, and levied on certain livestock belonging to Majors. On March 10, 1939, some four days prior to the issuance of the execution, certain sections of the law were repealed, and new law was enacted reducing the exemption for the judgment debtor from $750.00 to $450.00. The trial court held that since the judgment was rendered while the $750.00 exemption was in force, the judgment was entitled to the $750.00 exemption and not the $450.00 exemption which was in force at the time execution was issued. However, Chief Justice Grafton Green, speaking for the Supreme Court, reversed the trial court and stated:

> In Harris v. Glenn et al., supra, the court expressed itself in these words:

> "Debtors have no vested right not to pay their debts. What they have and what they acquire the state may subject to legal process for the satisfaction of creditors. * * * Exemption of property from levy and sale for the payment of debts, is but a privilege for the time being--mere grace and favor, dependent on the will of the state. An exemption which exists by statute may be reduced or withdrawn by statute."

It is well-settled law in this state that a statute enacted by the General Assembly is given prospective operation, and will be so construed unless a clear intention to the contrary is found in its provisions. See: *Woods v. TRW, Inc.*, 557 S.W. 2d 274 (1977). We find nothing in Chapter 915, Public Acts of 1978, to mandate other than a prospective operation.

We hold that the trial judge applied the correct law, that law effective on May 5, 1978, to the case at bar. Therefore the assignment of error of the defendant is respectfully overruled. The judgment of the lower court is hereby affirmed, and the costs are taxed against the defendant.

SUMMERS, J.

CONCUR:

MATHERNE, J.

LEWIS, J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MAURICE SAVARIN, Appellant VS. NATIONAL BANK OF COMMERCE - MASTER CHARGE, Appellee	)	FROM THE CIRCUIT COURT OF SHELBY COUNTY AT MEMPHIS

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Maurice Savarin, the appellant herein, hereby appeals to the Supreme Court of the United States from the opinion and judgment of this Court entered on September 18, 1979. Appellant's application for permission to appeal to the Supreme Court of Tennessee was denied by an order entered November 13, 1979, as was appellant's petition for reconsideration of that denial by an order entered December 27, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

ELBERT E. EDWARDS, III

J. MICHAEL FLETCHER
ATTORNEYS FOR APPELLANT,
MAURICE SAVARIN
MEMPHIS AREA LEGAL SERVICES, INC.
1254 Lamar Avenue, Suite 401
Memphis, Tennessee 38104
(901) 526-5132

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Notice of Appeal upon Glenn L. Millar, Jr., counsel for appellee, Suite 1100, 147 Jefferson Avenue, Memphis, Tennessee, 38103, by mailing a copy of said notice with first class postage prepaid this _____ day of _____, 1980.

I further certify that all parties required to be served have been served.

J. MICHAEL FLETCHER

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979

No. _____

MAURICE SAVARIN, Appellant

V.

NATIONAL BANK OF COMMERCE - MASTER CHARGE, Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TENNESSEE

CERTIFICATE OF SERVICE

I certify that I have served a copy of Appellant's Motion for Leave to Proceed in Forma Pauperis and Jurisdictional Statement on Glenn L. Millar, Jr., Suite 1100 147 Jefferson Avenue, Memphis, Tennessee, 38103, counsel for appellee, by depositing a copy of same in a mail box with first class postage prepaid this 12th day of February, 1980.

I further certify that all parties required to be served have been served.

Elbert E. Edwards, III

ELBERT E. EDWARDS, III
ATTORNEY FOR APPELLANT
MEMPHIS AREA LEGAL SERVICES
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